

Dawn Wagner 09/21/2022

1	IN THE UNITED STATES DISTRICT COURT	1	I N D E X	
2	DISTRICT OF SOUTH DAKOTA	2	WITNESS	EXAMINATION
3	WESTERN DIVISION	3	DAWN WAGNER	
4	AMERICAN ZURICH)	4	By MR. Sutton	9
5	INSURANCE COMPANY and)	5		
6	ZURICH AMERICAN) 5:20-CV-05026-KES	6		
7	INSURANCE COMPANY,)	7		
8	Plaintiffs,)	8		
9	vs.)	9	E X H I B I T S	
10	J. CRISMAN PALMER and)	10	NUMBER	MARKED FOR ID
11	GUNDERSON, PALMER,)	11	Wagner Deposition	
12	NELSON & ASHMORE, LLP,)	12		
13	Defendants.)	13	Exhibit No. 72	31
14	The Video Recorded deposition of DAWN	14	Exhibit No. 73	42
15	WAGNER, called for examination pursuant to the	15	Exhibit No. 74	45
16	Rules of Civil Procedure for the United States	16	Exhibit No. 75	50
17	District Courts pertaining to the taking of	17	Exhibit No. 76	51
18	depositions, taken before Wendi L. Mirshak, for	18	Exhibit No. 77	55
19	the County of McHenry and State of Illinois, at	19	Exhibit No. 78	64
20	1800 East Golf Road, Schaumburg, Illinois, on	20	Exhibit No. 79	64
21	September 21, 2022, at the hour of	21	Exhibit No. 80	64
22	9:00 o'clock a.m.	22	Exhibit No. 81	69
23	Wendi L. Mirshak	23	Exhibit No. 82	69
24	License No: 084-003960	24	Exhibit No. 83	70
	1			3
1	APPEARANCES:	1	E X H I B I T S	
2		2	NUMBER	MARKED FOR ID
3	PIA HOYT, LLC	3	Wagner Deposition	
4	BY: MR. SCOTT HOYT	4		
5	136 East South Temple	5	Exhibit No. 84	73
6	Suite 1900	6	Exhibit No. 85	76
7	Salt Lake City, Utah 84111	7	Exhibit No. 86	79
8	(801) 350-9022	8	Exhibit No. 87	81
9	shoyt@piohoyt.com	9	Exhibit No. 88	83
10	Representing the Plaintiffs;	10	Exhibit No. 89	88
11		11	Exhibit No. 90	93
12	BOYCE LAW FIRM, LLP	12	Exhibit No. 91	95
13	MR. JASON R. SUTTON	13	Exhibit No. 92	113
14	300 South Main Avenue	14	Exhibit No. 93	119
15	Sioux Falls, South Dakota 57104	15	Exhibit No. 94	119
16	(605) 336-2424	16	Exhibit No. 95	125
17	jrsutton@boycelaw.com	17	Exhibit No. 96	128
18	Representing the Defendants.	18	Exhibit No. 97	128
19		19	Exhibit No. 98	135
20		20	Exhibit No. 99	136
21	ALSO PRESENT:	21	Exhibit No. 100	137
22	Mr. John D'Andrea - videographer	22	Exhibit No. 101	138
23		23	Exhibit No. 102	147
24		24	Exhibit No. 103	147
	2			4



<p>1 Q. Anything else you recall reviewing?</p> <p>2 A. I may have looked at some</p> <p>3 correspondence that I received from Cris Palmer.</p> <p>4 Q. Do you recall any of the specific</p> <p>5 correspondence that you looked at?</p> <p>6 A. Just generally, our exchanges leading</p> <p>7 up to the mediation.</p> <p>8 Q. Anything else you recall looking at in</p> <p>9 preparation for your deposition here today?</p> <p>10 A. Nothing more I can recall at this time.</p> <p>11 Q. Other than your attorney have you</p> <p>12 spoken with anyone about being deposed here</p> <p>13 today?</p> <p>14 A. No.</p> <p>15 Q. Are you the person within Zurich that</p> <p>16 is the primary contact person for Mr. Hoyt in</p> <p>17 handling the malpractice case against Cris</p> <p>18 Palmer?</p> <p>19 A. Yes.</p> <p>20 Q. I want to switch gears just a little</p> <p>21 bit, ask some questions about your background.</p> <p>22 A. Okay.</p> <p>23 Q. I know you are a lawyer, so I know you</p> <p>24 graduated high school, but can you tell me where</p> <p style="text-align: right;">13</p>	<p>1 know. But my intent is just to refer</p> <p>2 generically as Zurich as the plaintiffs.</p> <p>3 Do you understand that?</p> <p>4 A. Sounds good.</p> <p>5 Q. When did you first start working for</p> <p>6 Zurich?</p> <p>7 A. 2002.</p> <p>8 Q. Walk me through generally your</p> <p>9 employment history from when you graduated law</p> <p>10 school in '96 up until when you started at</p> <p>11 Zurich in 2002?</p> <p>12 A. Sure. After graduation, but prior to</p> <p>13 passing the bar, I got a position with John</p> <p>14 Biestek and Associates in Arlington Heights,</p> <p>15 Illinois. I worked there for approximately a</p> <p>16 year. And then, I got a job downtown Chicago</p> <p>17 for a firm by the name of Galvin, Lowery and</p> <p>18 Meade. I worked there for approximately a year.</p> <p>19 And then, I worked for a law firm by the name of</p> <p>20 Corbin and Matthews in Chicago, Illinois.</p> <p>21 Again, for approximately a year.</p> <p>22 And then, I joined a law firm by the</p> <p>23 name of Querrey and Harrow. That's</p> <p>24 Q-U-E-R-R-E-Y and Harrow, H-R -- A-R-R-O-W.</p> <p style="text-align: right;">15</p>
<p>1 and when?</p> <p>2 A. High school?</p> <p>3 Q. Yeah.</p> <p>4 A. I went --</p> <p>5 Q. Just habit.</p> <p>6 A. I went to James B. Conant High School</p> <p>7 in Hoffman Estates, Illinois.</p> <p>8 Q. What's your undergraduate degree in?</p> <p>9 A. Communications.</p> <p>10 Q. Where did you go to school?</p> <p>11 A. Western Illinois University.</p> <p>12 Q. Any other degree other than your law</p> <p>13 degree that you obtained?</p> <p>14 A. No.</p> <p>15 Q. When did you attend law school?</p> <p>16 A. 1993 through 1996.</p> <p>17 Q. What law school did you attend?</p> <p>18 A. Northern Illinois University College of</p> <p>19 Law.</p> <p>20 Q. As we go along, I'm going to refer to</p> <p>21 Zurich just generically instead of the -- the</p> <p>22 specific entities. So, if some reason it</p> <p>23 matters whether it's, for instance, Zurich</p> <p>24 America or any of the specific entities, let me</p> <p style="text-align: right;">14</p>	<p>1 That was also in downtown Chicago. And I worked</p> <p>2 there up until I began working for Zurich.</p> <p>3 Q. During your time in private practice</p> <p>4 with those law firms, what was the nature of</p> <p>5 your practice?</p> <p>6 A. John Biestek and Associates was a</p> <p>7 general practice, personal injury, family law,</p> <p>8 real estate. Galvin, Lowery and Meade was</p> <p>9 in-house counsel for Warrior insurance company,</p> <p>10 which is an automobile insurance carrier.</p> <p>11 Corbin and Matthews was a plaintiff's personal</p> <p>12 injury firm. And Querrey and Harrow was an</p> <p>13 insurance defense firm.</p> <p>14 Q. At the insurance defense firm Querrey</p> <p>15 and Harrow, what types of files were you</p> <p>16 handling?</p> <p>17 A. I was handling insurance defense work</p> <p>18 for basically automobile defense. Also did some</p> <p>19 dental malpractice defense, medical malpractice</p> <p>20 defense.</p> <p>21 Q. Before starting at Zurich, had you ever</p> <p>22 appeared as counsel in a bad faith case?</p> <p>23 A. No.</p> <p>24 Q. Before starting at Zurich, have you --</p> <p style="text-align: right;">16</p>



<p>1 A. Up until the year 2013.</p> <p>2 Q. What was your next position within</p> <p>3 Zurich?</p> <p>4 A. It was assistant general counsel in the</p> <p>5 corporate law department.</p> <p>6 Q. How did your duties and</p> <p>7 responsibilities change in that position?</p> <p>8 A. It changed because I left the claims</p> <p>9 department for corporate law.</p> <p>10 Q. And what types -- when you entered the</p> <p>11 corporate law department, what were you doing on</p> <p>12 a general day to day basis?</p> <p>13 A. When I first started in corporate law?</p> <p>14 Q. Sure.</p> <p>15 A. Handling cases that have been filed</p> <p>16 against the company.</p> <p>17 Q. And that would be the company direct</p> <p>18 Zurich rather than a claim against Zurich's</p> <p>19 insureds; is that right?</p> <p>20 A. Correct.</p> <p>21 Q. Has your position within Zurich changed</p> <p>22 since 2013?</p> <p>23 A. Yes.</p> <p>24 Q. When did it change next?</p> <p style="text-align: right;">21</p>	<p>1 with the workers' compensation claim that</p> <p>2 Mr. Leichtnam asserted that formed the basis for</p> <p>3 the bad faith case?</p> <p>4 A. At any time?</p> <p>5 Q. Let me ask it this way.</p> <p>6 Prior to the commencement of the bad</p> <p>7 faith case, were you involved?</p> <p>8 A. No.</p> <p>9 Q. And the bad faith case, so we are on</p> <p>10 the same page, you and I both know is the -- the</p> <p>11 bad faith case that Mr. Leichtnam asserted</p> <p>12 against Zurich in which Cris Palmer is</p> <p>13 defending, at least initially; is that right?</p> <p>14 A. Yes.</p> <p>15 Q. Would you agree that that's -- that's</p> <p>16 what I'm referring to when I say the bad faith</p> <p>17 case.</p> <p>18 How about we say it that way?</p> <p>19 A. Okay.</p> <p>20 Q. During the bad faith case, although</p> <p>21 your title may have changed, did your duties and</p> <p>22 responsibilities within Zurich, were they</p> <p>23 always, as you described them, in from</p> <p>24 the assistant general counsel and corporate law</p> <p style="text-align: right;">23</p>
<p>1 A. I think approximately the year 2017.</p> <p>2 I'm not positive, but I was promoted to</p> <p>3 vice-president, senior assistant general</p> <p>4 counsel.</p> <p>5 Q. Did your duties and responsibilities</p> <p>6 change at that time?</p> <p>7 A. That was mostly a -- a title change</p> <p>8 promotion.</p> <p>9 Q. Are there any other times your position</p> <p>10 has changed with Zurich up through today?</p> <p>11 A. Last year.</p> <p>12 Q. What was the change that occurred last</p> <p>13 year?</p> <p>14 A. I was promoted to manager of a team of</p> <p>15 paralegals.</p> <p>16 Q. Did your duties and responsibilities</p> <p>17 within the company change?</p> <p>18 A. They -- it was added on to my current</p> <p>19 responsibilities and now I have the oversight</p> <p>20 function of managing paralegals that respond to</p> <p>21 subpoenas that are issued to the company.</p> <p>22 Q. Now, based -- let me ask. Strike that.</p> <p>23 Let me start over.</p> <p>24 Were you involved directly at any time</p> <p style="text-align: right;">22</p>	<p>1 department, the handling of the direct claims, I</p> <p>2 guess?</p> <p>3 A. Yeah, that's remained the same.</p> <p>4 Q. Originally I'll represent to you that</p> <p>5 the bad faith case was commenced in this case --</p> <p>6 or it was commenced in South Dakota in March</p> <p>7 of 2015.</p> <p>8 At that time do you recall to whom you</p> <p>9 reported?</p> <p>10 A. Yes.</p> <p>11 Q. Who was that?</p> <p>12 A. Bill Peterson.</p> <p>13 Q. What was Mr. Peterson's position?</p> <p>14 A. I don't recall his title. Maybe</p> <p>15 associate general counsel. I don't recall.</p> <p>16 Q. In 2015 do you know how many lawyers</p> <p>17 there were within the general counsel office of</p> <p>18 Zurich? Give me an estimate.</p> <p>19 A. Approximately between 20 and 30.</p> <p>20 Q. And can you give me an estimate on how</p> <p>21 many of those corporate law attorneys directly</p> <p>22 handled claims against the company?</p> <p>23 A. Four.</p> <p>24 Q. The four that were involved, were all</p> <p style="text-align: right;">24</p>



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<p>1 A. No.</p> <p>2 Q. From 2015 to 2020 did you personally</p> <p>3 believe that there were any limits on your</p> <p>4 authority to resolve a claim against the</p> <p>5 company, I mean, dollar limits?</p> <p>6 A. I would need to have that discussion</p> <p>7 with the internal stakeholder for authority.</p> <p>8 Q. Why would you have to have that</p> <p>9 discussion with the internal stakeholder for</p> <p>10 authority?</p> <p>11 A. That was the process.</p> <p>12 Q. Do you know, for -- for instance,</p> <p>13 budgeting or reporting purposes, if those claims</p> <p>14 affected in our example the workers'</p> <p>15 compensation division of Zurich? Do you know</p> <p>16 how that's reported internally?</p> <p>17 A. I don't know.</p> <p>18 MR. HOYT: Objection. Vague as to affected.</p> <p>19 THE WITNESS: Sorry. I don't know.</p> <p>20 BY MR. SUTTON:</p> <p>21 Q. Do you have any understanding as to why</p> <p>22 the process required you to get authority from</p> <p>23 the stakeholders as you described it?</p> <p>24 A. Why?</p> <p style="text-align: right;">29</p>	<p>1 (whereupon, Wagner Deposition</p> <p>2 Exhibit No. 72 was marked for</p> <p>3 identification.)</p> <p>4 BY MR. SUTTON:</p> <p>5 Q. Ms. Wagner, I've handed you Exhibit 72,</p> <p>6 which for the record is Zurich 2. And then a</p> <p>7 separate Bates No. 2990.</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. Looking at this e-mail, is this the</p> <p>11 e-mail that originally assigned the bad faith</p> <p>12 case to Cris Palmer and the Gunderson Palmer law</p> <p>13 firm?</p> <p>14 A. I believe so.</p> <p>15 Q. Looking at the bottom of Zurich 2990,</p> <p>16 the e-mail is originally from a Demetrius Rush.</p> <p>17 Do you know who Mr. Rush was?</p> <p>18 A. It's my co-worker.</p> <p>19 Q. And then, you indicate up above that</p> <p>20 you are going to be handling this case instead</p> <p>21 of Demetrius as indicated in the e-mail on</p> <p>22 March 20th at 3:22 p.m.; is that right?</p> <p>23 A. Yes.</p> <p>24 Q. Do you know why it was reassigned from</p> <p style="text-align: right;">31</p>
<p>1 Q. Yeah.</p> <p>2 A. That was just the process.</p> <p>3 Q. So, ultimately, who made the decision</p> <p>4 on whether to authorize a settlement in that</p> <p>5 2015 to 2020 time frame?</p> <p>6 A. On the Leitchnam case?</p> <p>7 Q. Sure. We will use that as an example.</p> <p>8 whose call is that?</p> <p>9 A. The chief claims officer.</p> <p>10 Q. Do you know who that was at the time?</p> <p>11 A. Steve Hatch.</p> <p>12 Q. Is he still employed with Zurich, if</p> <p>13 you know?</p> <p>14 A. No, he's not.</p> <p>15 Q. Do you know when he left?</p> <p>16 A. I don't know.</p> <p>17 Q. Do you have any idea where he is,</p> <p>18 either employed or retired now, do you know</p> <p>19 where he is?</p> <p>20 A. I have no idea.</p> <p>21 MR. SUTTON: I've got 72 as our next one.</p> <p>22 Yeah, that's right. Next to the witness, you're</p> <p>23 the most important person in the room.</p> <p>24</p> <p style="text-align: right;">30</p>	<p>1 Mr. Rush to you?</p> <p>2 A. I don't know if it was reassigned.</p> <p>3 Q. Do you know why Mr. Rush sent out the</p> <p>4 original engagement request?</p> <p>5 A. I think because he knew Cris Palmer.</p> <p>6 Q. Before this engagement had you ever had</p> <p>7 any experience with Mr. Palmer?</p> <p>8 A. No.</p> <p>9 Q. Before this engagement had you any</p> <p>10 experience with the Gunderson Palmer law firm?</p> <p>11 A. No.</p> <p>12 Q. Had you any experience with any lawyers</p> <p>13 in South Dakota?</p> <p>14 A. I think I had maybe one other case in</p> <p>15 South Dakota, but I don't recall the name of the</p> <p>16 firm or the attorney.</p> <p>17 Q. Do you know whether that case was a bad</p> <p>18 faith case?</p> <p>19 A. I think it was.</p> <p>20 Q. Do you recall who plaintiff's counsel</p> <p>21 was?</p> <p>22 A. No.</p> <p>23 Q. Okay. Before this bad faith case did</p> <p>24 you ever have any opportunity to have any</p> <p style="text-align: right;">32</p>



<p>1 developments that you are relying on to indicate</p> <p>2 that you needed to be provided a draft of the</p> <p>3 answer ahead of time?</p> <p>4 A. Those drafts should be transmitted in</p> <p>5 time for a corporate law attorney to provide</p> <p>6 substantive comments and purpose -- and propose</p> <p>7 meaningful revisions.</p> <p>8 Q. Is that the only language in any</p> <p>9 document that you are aware of in which you</p> <p>10 requested that a draft to the answer be provided</p> <p>11 to you prior to its filing?</p> <p>12 A. Well, I think there's general</p> <p>13 references in the paragraph above regarding</p> <p>14 timely notifying of new pleadings and motions.</p> <p>15 Q. Other than the billing guidelines, are</p> <p>16 you aware of any communication to the Gunderson</p> <p>17 Palmer law firm requesting that you be provided</p> <p>18 a draft of the answer prior to its filing?</p> <p>19 A. Not that I recall.</p> <p>20 (Whereupon, Wagner Deposition</p> <p>21 Exhibit No. 74 was marked for</p> <p>22 identification.)</p> <p>23 BY MR. SUTTON:</p> <p>24 Q. Ms. Wagner, you've been handed --</p>	<p>1 received this e-mail?</p> <p>2 A. I don't recall.</p> <p>3 Q. Would it have been your standard</p> <p>4 practice to review the pleadings when you</p> <p>5 received them?</p> <p>6 A. It depends.</p> <p>7 Q. What does it depend on?</p> <p>8 A. Depends on prior discussions, e-mail</p> <p>9 exchanges.</p> <p>10 Q. Do you recall whether there were any</p> <p>11 discussions or e-mail exchanges in the</p> <p>12 Leitchnam case that would have caused you to</p> <p>13 not review the answer?</p> <p>14 A. Because my general practice is that I</p> <p>15 expect my attorneys to follow our guidelines and</p> <p>16 send me drafts before they are filed.</p> <p>17 Q. You understood you had not reviewed a</p> <p>18 draft of this before it was filed, correct?</p> <p>19 A. I didn't recall if I did or not at this</p> <p>20 time.</p> <p>21 Q. How many files were you handling at</p> <p>22 that time?</p> <p>23 A. I don't recall.</p> <p>24 Q. Can you give me an estimate?</p>
<p>1 handed -- excuse me -- Exhibit 74, which is</p> <p>2 Bates stamped GPNA 4227.</p> <p>3 This is an e-mail from Kristi Wood to</p> <p>4 you on April 30, 2015; is that right?</p> <p>5 A. Yes.</p> <p>6 Q. And did you receive this e-mail?</p> <p>7 A. I believe so.</p> <p>8 Q. Any reason to dispute you received it?</p> <p>9 A. No.</p> <p>10 Q. Now, looking at the e-mail, Ms. Wood</p> <p>11 indicates, attached is a copy of Cris Palmer's</p> <p>12 correspondence to plaintiff's counsel regarding</p> <p>13 inquiry on stipulating to dismiss Zurich NA, is</p> <p>14 the first sentence; is that right?</p> <p>15 A. Yes.</p> <p>16 Q. And then, it also says, also attached</p> <p>17 is a copy of the answer we filed this afternoon;</p> <p>18 is this right?</p> <p>19 A. Yes.</p> <p>20 Q. And when you look up at the attachment</p> <p>21 section, there's a -- in the first line at the</p> <p>22 end, there's an answer, dot, PDF; is that right?</p> <p>23 A. Yes.</p> <p>24 Q. Did you review the answer when you</p>	<p>1 A. Forty to 50.</p> <p>2 Q. Based upon your time as a private</p> <p>3 practice lawyer, did you understand that there</p> <p>4 was a period of time in which the answer could</p> <p>5 be amended even without leave of court or</p> <p>6 agreement of the parties?</p> <p>7 A. I think it depends on jurisdiction.</p> <p>8 Q. This case was pending in federal court;</p> <p>9 is that right?</p> <p>10 A. Yes, I believe so.</p> <p>11 Q. And did you understand that at that</p> <p>12 time under the Federal Rules of Civil Procedure</p> <p>13 that the answer could be amended for 21 days</p> <p>14 automatically regardless of whether there was</p> <p>15 leave of court or permission of the other party?</p> <p>16 A. I mean the rules say what they are.</p> <p>17 Q. Do you remember if you ever reviewed</p> <p>18 the answer in this case?</p> <p>19 A. I remember reviewing the answer after</p> <p>20 retaining Hinshaw.</p> <p>21 Q. Before that do you believe you ever</p> <p>22 reviewed the answer?</p> <p>23 A. I don't recall.</p> <p>24 Q. Before the engagement of the Hinshaw</p>



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<p>1 firm in this case, did you ever have a</p> <p>2 discussion with Cris Palmer in which you</p> <p>3 inquired why he had not asserted a duty for</p> <p>4 affirmative defenses in the answer?</p> <p>5 A. I don't recall having that discussion.</p> <p>6 Q. Would that be something you would</p> <p>7 expect you would recall?</p> <p>8 A. Not necessarily.</p> <p>9 Q. Have you ever been to South Dakota?</p> <p>10 A. Yes.</p> <p>11 Q. When?</p> <p>12 A. For the mediation in this case.</p> <p>13 Q. Other than the mediation in this case,</p> <p>14 have you ever been there?</p> <p>15 A. No.</p> <p>16 Q. And I meant to ask this at the</p> <p>17 beginning, I forgot, so I apologize.</p> <p>18 What states are you licensed?</p> <p>19 A. Illinois.</p> <p>20 Q. Have you ever been licensed in any</p> <p>21 other jurisdictions other than Illinois?</p> <p>22 A. No.</p> <p>23 Q. Are you licensed -- have you been</p> <p>24 licensed in federal court?</p> <p style="text-align: right;">49</p>	<p>1 MR. SUTTON: Look at that airmail.</p> <p>2 THE REPORTER: Seventy-six.</p> <p>3 MR. SUTTON: Thank you.</p> <p>4 MR. HOYT: Seventy-six.</p> <p>5 THE WITNESS: Yeah, thank you.</p> <p>6 (Whereupon, Wagner Deposition</p> <p>7 Exhibit No. 76 was marked for</p> <p>8 identification.)</p> <p>9 BY MR. SUTTON:</p> <p>10 Q. And Ms. Wagner, if you look at</p> <p>11 Exhibit 76, that letter is dated August 3, 2015,</p> <p>12 from Cris Palmer to you; is that right?</p> <p>13 A. Yes.</p> <p>14 Q. So, Exhibit 76 is the attachment to</p> <p>15 Exhibit 75.</p> <p>16 Do you agree with that?</p> <p>17 A. Yes.</p> <p>18 Q. Looking at Exhibit 76, in the second</p> <p>19 sentence of the first paragraph Cris Palmer</p> <p>20 writes, there's several requests that may seem</p> <p>21 broad. However, my experience in this</p> <p>22 jurisdiction is that the court shows great</p> <p>23 leniency during the discovery process.</p> <p>24 Did you -- or did I read that</p> <p style="text-align: right;">51</p>
<p>1 A. Yes.</p> <p>2 Q. I assume in the district of Illinois?</p> <p>3 A. Yes.</p> <p>4 Q. I won't break them down.</p> <p>5 THE REPORTER: Seventy-five.</p> <p>6 (Whereupon, Wagner Deposition</p> <p>7 Exhibit No. 75 was marked for</p> <p>8 identification.)</p> <p>9 BY MR. SUTTON:</p> <p>10 Q. Ms. Wagner, you've been handed</p> <p>11 Exhibit 75.</p> <p>12 A. Yes.</p> <p>13 Q. And this is an e-mail from Beth Young</p> <p>14 to you dated Monday, August 3, 2015; is that</p> <p>15 right?</p> <p>16 A. Yes.</p> <p>17 Q. And do you understand that Beth Young</p> <p>18 is a paralegal in the Gunderson Palmer law firm?</p> <p>19 A. That's what it says, yes.</p> <p>20 Q. In this e-mail, Ms. Young indicates to</p> <p>21 you that attached is a letter from Cris and a</p> <p>22 copy of plaintiff's first set of requests for</p> <p>23 production of documents; is that right?</p> <p>24 A. Yes.</p> <p style="text-align: right;">50</p>	<p>1 correctly?</p> <p>2 A. You read that correctly.</p> <p>3 Q. And in fairness, I mean throughout the</p> <p>4 time that Cris was representing Zurich he was</p> <p>5 telling you repeatedly that South Dakota law --</p> <p>6 allows incredibly broad scope of discovery in</p> <p>7 bad faith proceedings?</p> <p>8 A. He -- he mentioned that, yes.</p> <p>9 Q. From your perspective in handling</p> <p>10 claims against the company, what is the</p> <p>11 significance of a court allowing very broad</p> <p>12 discovery?</p> <p>13 MR. HOYT: Objection. Overbroad. Vague.</p> <p>14 Incomplete.</p> <p>15 THE WITNESS: It depends.</p> <p>16 BY MR. SUTTON:</p> <p>17 Q. Is it significant to you?</p> <p>18 A. It could be.</p> <p>19 Q. In the Leichtnam case was it</p> <p>20 significant to you?</p> <p>21 A. It was.</p> <p>22 Q. And why was it significant?</p> <p>23 A. Because I paid a lot in defense costs</p> <p>24 due to the liberal discovery process.</p> <p style="text-align: right;">52</p>



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<p>1 protective order; is that right?</p> <p>2 A. Yes.</p> <p>3 Q. Would you please turn to Exhibit 80.</p> <p>4 Exhibit 80 is a letter from Mike Abourezk to</p> <p>5 Cris Palmer dated September 23, 2015. Is this</p> <p>6 right?</p> <p>7 A. Yes.</p> <p>8 Q. And it is Bates stamped Zurich 3168,</p> <p>9 which means that it came from your files in this</p> <p>10 malpractice action, that's what the Zurich two</p> <p>11 means, rather than produced in the underlying</p> <p>12 bad faith case.</p> <p>13 Do you know how you received a copy of</p> <p>14 this letter?</p> <p>15 A. I don't know.</p> <p>16 Q. Do you know whether you reviewed it?</p> <p>17 A. I don't recall.</p> <p>18 Q. Okay.</p> <p>19 MR. SUTTON: What number are we at?</p> <p>20 THE REPORTER: Eighty-one.</p> <p>21 (Whereupon, Wagner Deposition</p> <p>22 Exhibit Nos. 81-82 were marked</p> <p>23 for identification.)</p> <p>24</p> <p style="text-align: right;">69</p>	<p>1 BY MR. SUTTON:</p> <p>2 Q. Exhibit 83, when we look at Zurich</p> <p>3 3176, the second page, that's the original</p> <p>4 e-mail from Beth Young to you, which was</p> <p>5 Exhibit 81 we just looked at; is that right?</p> <p>6 A. Yes.</p> <p>7 Q. And Exhibit 83, is this your responsive</p> <p>8 e-mail on the first page?</p> <p>9 A. Yes.</p> <p>10 Q. Looking at your responsive e-mail, you</p> <p>11 write, quote, I am unable to provide the</p> <p>12 personnel files absent a court order, therefore,</p> <p>13 we should be objecting to number two, number</p> <p>14 four and number five.</p> <p>15 Did I read that correctly?</p> <p>16 A. Yes.</p> <p>17 Q. What was your basis for saying that you</p> <p>18 could not provide those personnel files without</p> <p>19 a court order?</p> <p>20 A. Privacy concerns.</p> <p>21 Q. Were those privacy concerns -- was that</p> <p>22 based upon internal Zurich policy or is that a</p> <p>23 separate independent legal basis you are</p> <p>24 referring to?</p> <p style="text-align: right;">71</p>
<p>1 BY MR. SUTTON:</p> <p>2 Q. Ms. Wagner, you've been handed</p> <p>3 Exhibit 81, which is an e-mail from Beth Young</p> <p>4 to you dated September 23, 2015; is that right?</p> <p>5 A. Yes.</p> <p>6 Q. And in the e-mail Ms. Young indicates</p> <p>7 that she is -- that, quote, attached is a letter</p> <p>8 from Cris outlining what discovery items are</p> <p>9 still needed, close quote.</p> <p>10 Did I read that correctly?</p> <p>11 A. Yes.</p> <p>12 Q. And will you look at Exhibit 82,</p> <p>13 please.</p> <p>14 Is this a letter from Cris Palmer to</p> <p>15 you dated September 23, 2015?</p> <p>16 A. Yes.</p> <p>17 Q. Will you just confirm that Exhibit 82</p> <p>18 is a true and accurate copy of the attachment in</p> <p>19 Exhibit 81?</p> <p>20 A. Yes.</p> <p>21 (Whereupon, Wagner Deposition</p> <p>22 Exhibit No. 83 was marked for</p> <p>23 identification.)</p> <p>24</p> <p style="text-align: right;">70</p>	<p>1 A. I mean, I need to protect information</p> <p>2 about our employees, so we have privacy concerns</p> <p>3 and I'm sure we have protocols within Zurich</p> <p>4 that protect against that.</p> <p>5 Q. Do you recall whether you went back and</p> <p>6 looked at those specific protocols?</p> <p>7 A. I think I already knew them.</p> <p>8 Q. Is there a formal written policy within</p> <p>9 Zurich that prohibits the production of those</p> <p>10 files without a court order at that time?</p> <p>11 A. Not related to litigation.</p> <p>12 Q. The formal policy prohibiting</p> <p>13 disclosure of those orders, when is it -- or</p> <p>14 strike that. Let me start over.</p> <p>15 The policy -- what does the policy say</p> <p>16 as to when personnel files could not be produced</p> <p>17 without a court order?</p> <p>18 A. It's not related to litigation. It's</p> <p>19 just general privacy concerns about personal</p> <p>20 identifying information about our employees.</p> <p>21 Q. Was it Zurich's practice at that time</p> <p>22 that it would not produce personnel files in</p> <p>23 litigation without a court order?</p> <p>24 A. I don't know if it was -- there was --</p> <p style="text-align: right;">72</p>



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<p>1 I don't think there was a policy.</p> <p>2 Q. Was it your practice at that time?</p> <p>3 A. I -- I don't know if I describe it as a</p> <p>4 practice because each case is different.</p> <p>5 Q. So, when you say, I'm unable to provide</p> <p>6 the personnel files absent a court order, is</p> <p>7 that just based on general privacy concerns?</p> <p>8 A. Yes and the discovery request that were</p> <p>9 sent on this case.</p> <p>10 Q. Can you identify for me any specific</p> <p>11 legal basis that would prohibit the disclosure</p> <p>12 of that information in litigation?</p> <p>13 A. Yes, there's lots of case law that</p> <p>14 protects personnel files being produced in</p> <p>15 litigation.</p> <p>16 THE REPORTER: Eighty-four.</p> <p>17 THE WITNESS: Thank you.</p> <p>18 (Whereupon, Wagner Deposition</p> <p>19 Exhibit No. 84 was marked for</p> <p>20 identification.)</p> <p>21 BY MR. SUTTON:</p> <p>22 Q. Exhibit 84 is Bates stamped Zurich 3185</p> <p>23 through 3200; is that correct?</p> <p>24 A. Yes.</p> <p style="text-align: right;">73</p>	<p>1 Q. Looking down at the third paragraph</p> <p>2 Cris writes, I've been involved in many bad</p> <p>3 faith cases in South Dakota's federal courts and</p> <p>4 all of our judges based on the history of bad</p> <p>5 faith cases here routinely make carriers produce</p> <p>6 the personnel files.</p> <p>7 Did I read that correctly?</p> <p>8 A. You read that correctly.</p> <p>9 Q. And then at the end of that paragraph</p> <p>10 Cris writes, quote, as I think I have expressed</p> <p>11 to you in the past, and if I have, I apologize,</p> <p>12 I'm going to do it again, that I hate to have</p> <p>13 cases start out with discovery disputes knowing</p> <p>14 we are not going to prevail. It can set a bad</p> <p>15 tone for the case.</p> <p>16 Did I read that correctly?</p> <p>17 A. You read that correctly.</p> <p>18 Q. Based upon your handling of litigation</p> <p>19 files against Zurich, do you disagree with</p> <p>20 Attorney Palmer's -- well, strike that. Never</p> <p>21 mind. Withdraw the question.</p> <p>22 If you turn to Zurich 3186. With</p> <p>23 regard to Request 16, we will certainly follow</p> <p>24 up on your thoughts here. The other thing I</p> <p style="text-align: right;">75</p>
<p>1 Q. And this is a letter from Cris Palmer</p> <p>2 to you dated September 24, 2015?</p> <p>3 A. Yes.</p> <p>4 Q. This letter in the first sentence of</p> <p>5 the paragraph Cris writes, thank you for your</p> <p>6 sent e-mail; is that right?</p> <p>7 A. Yes.</p> <p>8 Q. So, is this letter, Exhibit 84, the</p> <p>9 responsive letter to your e-mail, which is</p> <p>10 Exhibit 83, written on the same day?</p> <p>11 A. I assume.</p> <p>12 Q. In the first paragraph, the second</p> <p>13 sentence, Cris writes, quote, the one thing I do</p> <p>14 want to express my concern about is with regard</p> <p>15 to the personnel files. I am almost a hundred</p> <p>16 percent certain that Judge Viken will make you</p> <p>17 produce those personnel files, close quote.</p> <p>18 Did I read that correctly?</p> <p>19 A. You did.</p> <p>20 Q. Before the Leichtnam case, had you</p> <p>21 handled any other cases that you can recall that</p> <p>22 were pending before District Court Judge Viken</p> <p>23 in Rapid City?</p> <p>24 A. Not that I recall.</p> <p style="text-align: right;">74</p>	<p>1 want to do -- want to share with you with regard</p> <p>2 to newsletters and bad faith litigation with</p> <p>3 other carriers, we have sometimes had upwards of</p> <p>4 10,000 pages of newsletters produced so we may</p> <p>5 have to work to show it is burdensome.</p> <p>6 Is that what Mr. Palmer told you</p> <p>7 regarding the production of the newsletters?</p> <p>8 A. That's what this says.</p> <p>9 Q. And I realize there's a copying error</p> <p>10 on at least my version of Exhibit 84. 84 should</p> <p>11 be two pages, Zurich 381 [sic] to 3816.</p> <p>12 The original exhibits that you have,</p> <p>13 Ms. Wagner, do they continue past 3816?</p> <p>14 A. Yes.</p> <p>15 Q. Will you please remove the back pages</p> <p>16 of that exhibit.</p> <p>17 THE REPORTER: Eighty-five.</p> <p>18 (Whereupon, Wagner Deposition</p> <p>19 Exhibit No. 85 was marked for</p> <p>20 identification.)</p> <p>21 BY MR. SUTTON:</p> <p>22 Q. Ms. Wagner, you've been handed</p> <p>23 Exhibit 85, which is Zurich 3217 through 3220.</p> <p>24 Looking at the bottom of Page 85,</p> <p style="text-align: right;">76</p>



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<p>1 leave in the objections.</p> <p>2 Is that what she wrote to you?</p> <p>3 A. That's what she wrote, yes.</p> <p>4 Q. And then, in the next sentence, she</p> <p>5 advises you that she expects that, quote,</p> <p>6 plaintiff's counsel will very likely respond</p> <p>7 immediately with a request to confer, which</p> <p>8 precedes a motion to compel if the parties</p> <p>9 remain at odds, close quote.</p> <p>10 Did I read that correctly?</p> <p>11 A. You did, yes.</p> <p>12 Q. And so, you understood that if you</p> <p>13 remain on those objections, your lawyers were</p> <p>14 anticipating a motion to compel would be</p> <p>15 possible?</p> <p>16 A. That's what she said. If they couldn't</p> <p>17 come to some other agreement, it looks like.</p> <p>18 (Whereupon, Wagner Deposition</p> <p>19 Exhibit No. 87 was marked for</p> <p>20 identification.)</p> <p>21 BY MR. SUTTON:</p> <p>22 Q. Exhibit 87 is an e-mail chain. The</p> <p>23 oldest e-mail of which is an e-mail from Beth</p> <p>24 Young to you copying Jennifer Hover on</p> <p style="text-align: right;">81</p>	<p>1 A. I believe so.</p> <p>2 Q. And no court had ordered the production</p> <p>3 of those documents at that time, correct?</p> <p>4 A. That's correct.</p> <p>5 (Whereupon, Wagner Deposition</p> <p>6 Exhibit No. 88 was marked for</p> <p>7 identification.)</p> <p>8 BY MR. SUTTON:</p> <p>9 Q. Exhibit 88 is a letter from Jana Smoot</p> <p>10 White to Mike Abourezk and Mike Simpson dated</p> <p>11 October 2, 2015, that you received a copy of; is</p> <p>12 that right, Ms. Wagner?</p> <p>13 A. Yes.</p> <p>14 Q. And with this letter Ms. Smoot White is</p> <p>15 serving the responses to the written discovery</p> <p>16 along with some discovery documents; is that</p> <p>17 right?</p> <p>18 A. Yes.</p> <p>19 Q. And she writes that those documents,</p> <p>20 quote, are being produced under the cover of the</p> <p>21 protective order, which I have signed, close</p> <p>22 quote.</p> <p>23 Did I read that correctly?</p> <p>24 A. Yes, you read that correctly.</p> <p style="text-align: right;">83</p>
<p>1 October 1st, 2015 at 8:53 a.m.; is that right?</p> <p>2 A. Yes.</p> <p>3 Q. And in that e-mail from Ms. Young,</p> <p>4 she's providing you a draft of the responses to</p> <p>5 the written discovery; is that right?</p> <p>6 A. Yes.</p> <p>7 Q. Do you -- you write a responsive e-mail</p> <p>8 on October 1 at 9:52 a.m.; is that right?</p> <p>9 A. Yes.</p> <p>10 Q. And you indicate, quote, I've had a</p> <p>11 chance to review the personnel files of Jason</p> <p>12 Suttler, Kim Duncan, and Amy Mueller, who were</p> <p>13 the claims handlers and supervisor at the time</p> <p>14 of the allegations contained in the plaintiff's</p> <p>15 complaint, open paren, 2009 and 2012, close</p> <p>16 paren. Perhaps we could include partial</p> <p>17 personnel files which include performance</p> <p>18 evaluations.</p> <p>19 Is that what you wrote?</p> <p>20 A. That's what I wrote.</p> <p>21 Q. At this time on October 1st of 2015,</p> <p>22 were you in agreement providing at least</p> <p>23 portions of the personnel files to plaintiff's</p> <p>24 counsel in response to discovery?</p> <p style="text-align: right;">82</p>	<p>1 Q. Are you aware of any evidence</p> <p>2 indicating that any of the confidential</p> <p>3 documents produced by Zurich in the bad faith</p> <p>4 case were ever used in contravention of the</p> <p>5 protective order that was entered?</p> <p>6 A. Can you repeat that?</p> <p>7 MR. SUTTON: Can you read it back.</p> <p>8 (Whereupon, the record was read</p> <p>9 as requested.)</p> <p>10 THE WITNESS: I don't know.</p> <p>11 BY MR. SUTTON:</p> <p>12 Q. As part of this malpractice action, is</p> <p>13 Zurich alleging that the Gunderson Palmer law</p> <p>14 firm made a mistake in producing documents prior</p> <p>15 to the entry of protective order?</p> <p>16 A. I believe there's allegations of</p> <p>17 general breach of fiduciary duty.</p> <p>18 Q. And as part of those allegations of</p> <p>19 breach of fiduciary duty, is Zurich claiming</p> <p>20 that the Gunderson Palmer law firm breached its</p> <p>21 duty by producing documents prior to the entry</p> <p>22 of a protective order?</p> <p>23 A. I'm not sure if I understand that</p> <p>24 question.</p> <p style="text-align: right;">84</p>



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<p>1 Q. Do you understand what the allegations 2 are that Zurich is using to form the basis for 3 its breach of fiduciary duty claims? 4 A. I do. 5 Q. And do those include a claim that 6 Gunderson Palmer should not have produced any 7 documents until after the judge entered the 8 protective order? 9 A. That would be covered under the general 10 allegations that we assert under breach of 11 fiduciary duty. 12 Q. So, that is a claim that you are 13 asserting in this case -- Zurich is asserting, 14 correct? 15 A. It could be. 16 Q. All right. Is it a claim that Zurich 17 is asserting in this case? 18 MR. HOYT: Well, Counsel, the pleadings will 19 speak to what the claim is. 20 THE WITNESS: Yeah. 21 BY MR. SUTTON: 22 Q. Do you know whether that form -- that 23 factual basis forms any aspect of what Zurich is 24 in fact claiming in this case?</p> <p style="text-align: right;">85</p>	<p>1 form the factual basis for your claims of breach 2 fiduciary duty in this case? 3 A. That's a broad question. I can't 4 answer that the way that's -- that's asked. 5 Q. Other than the production of documents 6 that contained potential attorney-client 7 privilege information, is there any other aspect 8 of the production of the discovery that forms a 9 factual basis for Zurich's breach of fiduciary 10 duty claims? 11 MR. HOYT: Can I hear that back? 12 (Whereupon, the record was read 13 as requested.) 14 MR. HOYT: I'm going to object as vague, 15 overbroad, and incomplete. 16 THE WITNESS: I can't think of anything right 17 now. 18 BY MR. SUTTON: 19 Q. Is there anyone else within Zurich that 20 would be in a better position than you to 21 articulate the factual basis for the allegations 22 against the Gunderson Palmer law firm in this 23 case? 24 A. My attorney.</p> <p style="text-align: right;">87</p>
<p>1 A. I don't understand that question. 2 Q. As part of the lawsuit that Zurich has 3 brought against Gunderson Palmer, are one of the 4 allegations of breach of fiduciary duty that 5 Gunderson Palmer was -- made a mistake in 6 producing documents before the protective order 7 was entered? Is that a claim or not? 8 A. As I stated before, there's general 9 allegations of breach of fiduciary duty 10 contained in the complaint that could encompass 11 those types of acts. 12 Q. Do you know whether they encompass 13 that -- that factual basis forms part of your 14 claim for breach of fiduciary duty? 15 A. I recall that Cris Palmer did turn over 16 a document during discovery that I believe 17 Abourezk flagged as confidential. 18 Q. Are you referring to the production of 19 the document that contained some attorney-client 20 privilege information? 21 A. I believe so. 22 Q. And so -- and I want to make sure that 23 I understand. So, are there any other documents 24 that you are aware of that were produced that</p> <p style="text-align: right;">86</p>	<p>1 Q. Within Zurich as an entity, rather than 2 your attorney? 3 A. No. 4 (Whereupon, Wagner Deposition 5 Exhibit No. 89 was marked for 6 identification.) 7 BY MR. SUTTON: 8 Q. Ms. Wagner, do you have Exhibit 89 in 9 front of you? 10 A. I do. 11 Q. Exhibit 89 is a letter from Cris Palmer 12 to you dated September 25, 2015; is that right? 13 A. Yes. 14 Q. And this is the same time that you are 15 also working with the Gunderson Palmer law firm 16 and responding to the written discovery; is that 17 right? 18 A. Yes. 19 Q. In Exhibit 89, attorney Palmer 20 references a, enclosed please find a letter that 21 I received from Mike Abourezk; is that right? 22 A. Yes. 23 Q. I'm going to hand you, maybe, what was 24 previously marked as Exhibit 19.</p> <p style="text-align: right;">88</p>



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<p>1 when to just summarize the recommendation for 2 the management? 3 A. If it was requested. 4 Q. Before the Leichtnam case, had you 5 handled other bad faith cases with the head of 6 claims at that point in time? 7 A. I'm not sure. 8 Q. Do you know whether he would be -- 9 whether he had in the past requested that the 10 actual summary letter from the lawyer be 11 forwarded? 12 A. I'm not sure. 13 THE REPORTER: Ninety. 14 MR. SUTTON: Thank you. 15 (Whereupon, Wagner Deposition 16 Exhibit No. 90 was marked for 17 identification.) 18 BY MR. SUTTON: 19 Q. Ms. Wagner, I've handed you Exhibit 90, 20 which is Bates stamped Zurich 3318 to 3319. 21 Is this a letter that -- from attorney 22 Palmer to you on November 24, 2015? 23 A. Yes. 24 Q. And in this letter in the first</p> <p style="text-align: right;">93</p>	<p>1 Did I read that correctly? 2 A. You read that correctly. 3 Q. And the last paragraph, he's reminding, 4 again, discovery is going to be painful and 5 expensive; isn't he? 6 A. You are, again, reading that correctly. 7 (Whereupon, Wagner Deposition 8 Exhibit No. 91 was marked for 9 identification.) 10 BY MR. SUTTON: 11 Q. Ms. Wagner, you've been handed 12 Exhibit 91, which is a letter dated December 14, 13 2015, from Cris Palmer to you; is that right? 14 A. Yes. 15 Q. And in that letter, Mr. Palmer 16 indicates that he is enclosing a, quote, 17 lengthy, close quote, response I received from 18 Mike Abourezk regarding our discovery responses; 19 is that right? 20 A. Yes. 21 Q. And he indicates that that's a meet and 22 confer letter that was anticipated? 23 A. Is that how he categorized? If 24 that's --</p> <p style="text-align: right;">95</p>
<p>1 sentence, attorney Palmer encloses a copy of a 2 decision from Judge Duffy regarding recent 3 discovery disputes in a bad faith case, correct? 4 A. Correct. 5 Q. Do you recall -- did you -- did you 6 read this letter when you received it? 7 A. I'm sure I did. 8 Q. Would you have read the decision that 9 was provided with it? 10 A. Perhaps. I'm sure I over viewed it. 11 Q. In the first paragraph, attorney Palmer 12 says, quote, as I've told you, it doesn't work 13 out well for defendants and this is just the 14 recent look at it. 15 Is that what he wrote? 16 A. That's what he wrote. 17 Q. And he's talking about the scope of 18 discovery in South Dakota, correct? 19 A. Yes. 20 Q. He then indicates in the second 21 paragraph, quote, in trying to value these 22 cases, it gets to be a point where there is a 23 large major, the dollar payment that you can 24 tolerate to get rid of the thing, close quote.</p> <p style="text-align: right;">94</p>	<p>1 Q. He didn't. Let me -- 2 A. -- what it says, then I'm sure that's 3 what -- 4 Q. Here is exactly what he said. Quote, 5 this would be the equivalent of what I would 6 call a true and meet confer, close quote. 7 Did I read correctly? 8 A. Yes. 9 Q. And you understand as a lawyer that 10 meet and confer is the first step for pursuing a 11 motion to compel, correct? 12 A. It's a step in the discovery process, 13 correct. 14 Q. And a motion to compel would be when a 15 party goes to the court and asks that the other 16 side be required to provide information that 17 they have not yet provided; is that a fair 18 summary? 19 A. Yes. 20 Q. Now, will you please -- I'm going to 21 hand you -- excuse me, what was previously 22 marked as Exhibit 44. 23 THE VIDEOGRAPHER: Counsel, your microphone 24 is falling.</p> <p style="text-align: right;">96</p>



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<p>1 Q. I'm sorry.</p> <p>2 A. The one that we --</p> <p>3 Q. Exhibit 92.</p> <p>4 A. The one that we called back?</p> <p>5 Q. Yes.</p> <p>6 Is that the same meeting?</p> <p>7 A. Yes.</p> <p>8 Q. Okay.</p> <p>9 (Whereupon, Wagner Deposition</p> <p>10 Exhibit No. 95 was marked for</p> <p>11 identification.)</p> <p>12 BY MR. SUTTON:</p> <p>13 Q. Exhibit 95 is a letter from Cris Palmer</p> <p>14 to you dated March 15, 2016; is that right,</p> <p>15 Ms. Wagner?</p> <p>16 A. It is.</p> <p>17 Q. And in this letter, in the first</p> <p>18 sentence, Cris writes, I'd like to visit with</p> <p>19 you about settling this case and how to approach</p> <p>20 the settlement offer?</p> <p>21 A. Yes.</p> <p>22 Q. Did you receive that letter?</p> <p>23 A. Yes.</p> <p>24 Q. And did you read it when you received</p> <p style="text-align: right;">125</p>	<p>1 would be more comfortable in a mediation setting</p> <p>2 and I can certainly live with that.</p> <p>3 Did I read that correctly?</p> <p>4 A. Yes.</p> <p>5 Q. Now, a minute ago you testified that</p> <p>6 you thought that it was attorney Palmer that had</p> <p>7 recommended mediation.</p> <p>8 Does Exhibit 25 refresh your</p> <p>9 recollection as to who was -- or whether you</p> <p>10 preferred mediation versus a direct counteroffer</p> <p>11 approach to resolution?</p> <p>12 A. So based upon this letter, it looks</p> <p>13 like we talked about different approaches and in</p> <p>14 the first paragraph is where he's recommending</p> <p>15 the mediation setting and the second paragraph,</p> <p>16 he's referencing that during our conversation</p> <p>17 that I was leaning towards a mediation setting</p> <p>18 as well.</p> <p>19 Q. One of the approaches that you could</p> <p>20 have taken in response to attorney Abourezk is</p> <p>21 to just make a direct counteroffer rather than</p> <p>22 in a mediation setting; is that right?</p> <p>23 A. That's an option, yes.</p> <p>24 Q. Do you recall as you sitting here</p> <p style="text-align: right;">127</p>
<p>1 it?</p> <p>2 A. I'm sure I did.</p> <p>3 Q. I'm going to hand you what's previously</p> <p>4 been marked as Exhibit 25. This is a letter</p> <p>5 from Cris Palmer to you dated April 6 [sic],</p> <p>6 2016; is that right?</p> <p>7 A. No.</p> <p>8 Q. And did you receive this letter?</p> <p>9 A. Yes.</p> <p>10 Q. And I assume you read it when you</p> <p>11 received it?</p> <p>12 A. Yes.</p> <p>13 Q. Now, in the second sentence of this</p> <p>14 letter, Cris writes, although I have had the</p> <p>15 best success in the past dealing with Mike</p> <p>16 Abourezk on a one-on-one basis, based on our</p> <p>17 discussions and your thoughts with regard to</p> <p>18 evaluating the claim, I'm thinking maybe it</p> <p>19 makes more sense in this setting to see if he's</p> <p>20 willing to mediate this matter.</p> <p>21 Did I read that correctly?</p> <p>22 A. Yes.</p> <p>23 Q. And then in the second paragraph, he</p> <p>24 says, I sense from our conversations that you</p> <p style="text-align: right;">126</p>	<p>1 whether you personally had a preference for</p> <p>2 negotiating through a mediation versus making a</p> <p>3 direct counteroffer?</p> <p>4 A. I was relying on Cris Palmer's</p> <p>5 recommendations and our discussions, but more</p> <p>6 typically in cases most attorneys prefer a</p> <p>7 mediation setting.</p> <p>8 Q. Do -- did you have a preference?</p> <p>9 A. I'm open to any options to try and</p> <p>10 resolve a case.</p> <p>11 (Whereupon, Wagner Deposition</p> <p>12 Exhibit Nos. 96-97 were marked</p> <p>13 for identification.)</p> <p>14</p> <p>15 BY MR. SUTTON:</p> <p>16 Q. Ms. Wagner, you've been handed</p> <p>17 Exhibit 96, which is an e-mail exchange Bates</p> <p>18 stamped Zurich 3494, 3495. Looking at the</p> <p>19 bottom e-mail, which is from Kristi Wood to you,</p> <p>20 dated April 8, 2016, will you just please</p> <p>21 confirm that that's the e-mail that attaches</p> <p>22 Exhibit 25?</p> <p>23 A. Twenty-five, yes.</p> <p>24 Q. And then on April 11, 2016, you write</p> <p style="text-align: right;">128</p>



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<p>1 back indicating you agree with the plan, 2 correct? 3 A. Yes. 4 Q. Will you look at Exhibit 97, please. 5 A. Yes. 6 Q. Exhibit 97 is a letter from attorney 7 Palmer to you dated June 10, 2016; is this 8 right? 9 A. Yes. 10 Q. And he indicates in the first paragraph 11 he's going to follow up about getting the 12 mediation scheduled, correct? 13 A. Yes. 14 Q. And then in the second paragraph, he 15 writes, quote, I do want you to know that he 16 just tried a bad faith case against Travelers 17 last week, and got an underlying verdict of 18 950,000 and 2.75 in punitive damages; is that 19 correct? 20 A. You read that correct. 21 Q. And did you understand the 2.75 to be 22 2.75 million? 23 A. Yes. 24 Q. Now, there was a mediation that</p> <p style="text-align: right;">129</p>	<p>1 mine always send discovery and it's not 2 something I need to instruct them to do. 3 Q. When you traveled to Sioux Falls, did 4 you have settlement authority? 5 A. I didn't travel to Sioux Falls. 6 Q. Excuse me. I'm sorry, bad question. 7 Thank you. 8 When you traveled to Rapid City for the 9 mediation, did you have settlement authority? 10 A. I did. 11 Q. How much was the authority that you 12 had? 13 A. Two hundred thousand. 14 Q. And that authority was based upon -- 15 well, never mind. I -- I'll withdraw the 16 question. 17 MR. HOYT: You know, it just occurs to me. 18 Do we need to check out? 19 MR. SUTTON: Probably. I did. Do you want 20 to do that? 21 MR. HOYT: I better go. 22 MR. SUTTON: Let's take a break. 23 THE WITNESS: You don't want to get charged 24 another night here.</p> <p style="text-align: right;">131</p>
<p>1 occurred; is that right? 2 A. Eventually. 3 Q. And -- and that was in October of 2016, 4 correct? 5 A. Yes. 6 Q. Did you travel to Rapid City for that 7 mediation? 8 A. I did. 9 Q. At any time prior to the mediation, did 10 you instruct attorney Palmer to send discovery 11 to Mr. Leichtnam? 12 A. Outside of the guidelines, I don't 13 recall a specific e-mail. 14 Q. Do you recall having any discussions 15 with attorney Palmer that it would be helpful to 16 have pending discovery for leverage purposes at 17 the mediation? 18 A. To be honest, I assumed he had sent 19 them. 20 Q. In other instances, have you had 21 conversation with defense counsel that you want 22 to send discovery in order to apply pressure on 23 mediation? 24 A. Typically, attorneys defending cases of</p> <p style="text-align: right;">130</p>	<p>1 THE VIDEOGRAPHER: The time is 12:16 and we 2 are off the record. 3 (whereupon, a discussion was had 4 off the record.) 5 THE VIDEOGRAPHER: All right. We are back on 6 the record and the time is 12:23. 7 BY MR. SUTTON: 8 Q. Ms. Wagner, right before we broke we 9 were talking about the mediation. 10 Do you recall that the first offer made 11 by Mike Abourezk at the mediation to settle was 12 \$2 million? 13 A. I recall that his opening demand at the 14 mediation was 2 million, yes. 15 Q. And Zurich countered with \$10,000 as an 16 offer, correct? 17 A. That was our first offer. 18 Q. And then, the demand was reduced to 19 \$1,995,000; is that right? 20 A. It was. 21 Q. And then that was the end of the 22 mediation, correct? 23 A. Yes, those were the last numbers 24 discussed.</p> <p style="text-align: right;">132</p>



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<p>1 Q. Do you recall having any discussions</p> <p>2 with attorney Palmer during the mediation about</p> <p>3 next steps in the defense of the case?</p> <p>4 A. I don't recall if we did or not.</p> <p>5 Q. After the mediation there was no</p> <p>6 further settlement discussions with Mike</p> <p>7 Abourezk in the bad faith case until the Hinshaw</p> <p>8 firm effectively had taken over, correct?</p> <p>9 A. I believe so, yes.</p> <p>10 Q. As part of this malpractice case, is</p> <p>11 Zurich alleging that attorney Palmer's mistakes</p> <p>12 in handling the defense of the case may --</p> <p>13 weakened your negotiating position at the</p> <p>14 mediation?</p> <p>15 A. Absolutely.</p> <p>16 Q. And at any time after the mediation,</p> <p>17 did you instruct attorney Palmer to reinitiate</p> <p>18 settlement discussions?</p> <p>19 A. I don't recall.</p> <p>20 Q. What was your reaction when you left</p> <p>21 the mediation?</p> <p>22 A. Shocked. Disappointed.</p> <p>23 Q. What was causing your disappointment?</p> <p>24 A. The fact that the demand was higher</p> <p style="text-align: right;">133</p>	<p>1 had with attorney Palmer while in Rapid City for</p> <p>2 the mediation regarding the plan for handling</p> <p>3 the case after the settlement mediation was</p> <p>4 unsuccessful?</p> <p>5 A. I don't remember.</p> <p>6 THE REPORTER: Ninety-eight.</p> <p>7 THE WITNESS: Thank you.</p> <p>8 (Whereupon, Wagner Exhibit</p> <p>9 No. 98 was marked for</p> <p>10 identification.)</p> <p>11 BY MR. SUTTON:</p> <p>12 Q. Ms. Wagner, you've been handed</p> <p>13 Exhibit 98, which is a letter from attorney Cris</p> <p>14 Palmer to you dated December 2, 2016; is that</p> <p>15 right?</p> <p>16 A. Yes.</p> <p>17 Q. And in that letter, Mr. Palmer provided</p> <p>18 to you a copy of the plaintiff's expert, Elliott</p> <p>19 Flood; is that right?</p> <p>20 A. Yes.</p> <p>21 Q. And Mr. Palmer writes, after you have</p> <p>22 had a chance to review this, we should talk</p> <p>23 about what we want to do with regard to the</p> <p>24 retention of our own expert; is that right?</p> <p style="text-align: right;">135</p>
<p>1 when I arrived versus what I thought it was when</p> <p>2 I was flying out there.</p> <p>3 Q. At the mediation would you have paid</p> <p>4 \$300,000?</p> <p>5 A. Possibly.</p> <p>6 Q. What steps would you have needed to</p> <p>7 take at the mediation in order to obtain that</p> <p>8 authority?</p> <p>9 A. Make a phone call.</p> <p>10 Q. And that phone call would be to whom?</p> <p>11 A. Steve Hatch.</p> <p>12 Q. When you arrived at the mediation, had</p> <p>13 you determined what your walk away number was</p> <p>14 going to be?</p> <p>15 A. No.</p> <p>16 Q. Based on what you knew at the time, did</p> <p>17 you believe that \$300,000 was a reasonable</p> <p>18 settlement value for the case?</p> <p>19 A. I did.</p> <p>20 Q. And were you prepared to recommend a</p> <p>21 settlement of \$300,000 at the mediation if it</p> <p>22 would have resolved the case?</p> <p>23 A. I would have.</p> <p>24 Q. Do you recall any discussions that you</p> <p style="text-align: right;">134</p>	<p>1 A. You read that correct, yes.</p> <p>2 Q. Did you review Mr. Flood's report when</p> <p>3 it was provided?</p> <p>4 A. I believe I did.</p> <p>5 (Whereupon, Wagner Deposition</p> <p>6 Exhibit No. 99 was marked for</p> <p>7 identification.)</p> <p>8 BY MR. SUTTON:</p> <p>9 Q. Exhibit 99 is a letter from Cris Palmer</p> <p>10 to you dated December 16, 2016; is that right,</p> <p>11 Ms. Wagner?</p> <p>12 A. Yes.</p> <p>13 Q. And in this letter at the third</p> <p>14 paragraph, attorney Palmer indicates, as the</p> <p>15 mediation on October 24 was not successful, I</p> <p>16 anticipate plaintiff's counsel will now pursue</p> <p>17 responses to the discovery, including the likely</p> <p>18 motion to compel; is that right?</p> <p>19 A. You read that correctly.</p> <p>20 Q. And just so that, I mean it's clear, at</p> <p>21 least up through the mediation, the meet and</p> <p>22 confer letter and the discovery deficiencies</p> <p>23 that were out there, plaintiff's counsel wasn't</p> <p>24 pushing on those, correct?</p> <p style="text-align: right;">136</p>



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<p>1 A. Not that I was aware.</p> <p>2 Q. Attorney Palmer says in the bottom</p> <p>3 paragraph on Zurich 3654, therefore, I want to</p> <p>4 provide you the enclosed detailed analysis of</p> <p>5 plaintiff's request and the likely ruling if the</p> <p>6 request were to go to court on a motion to</p> <p>7 compel and my advice how to proceed.</p> <p>8 Did I read that correctly?</p> <p>9 A. Yes.</p> <p>10 (Whereupon, Wagner Deposition</p> <p>11 Exhibit No. 100 was marked for</p> <p>12 identification.)</p> <p>13 BY MR. SUTTON:</p> <p>14 Q. And then, will you please turn to</p> <p>15 Exhibit 100. And Ms. Wagner, I'll represent to</p> <p>16 you that Exhibit 100 is this memorandum that</p> <p>17 goes from Zurich 3656 to 3666, is next in the</p> <p>18 sequential Bates stamp of the documents produced</p> <p>19 by Zurich from Exhibit 99.</p> <p>20 Do you know whether Exhibit 100 is the</p> <p>21 enclosure that was provided to you with</p> <p>22 Exhibit 99?</p> <p>23 A. I believe it was.</p> <p>24 Q. Did you review Exhibit 100 when you</p> <p style="text-align: right;">137</p>	<p>1 reviewing the memo that was provided to you by</p> <p>2 attorney Palmer?</p> <p>3 A. I believe so, yes.</p> <p>4 Q. I'm going to hand you what has</p> <p>5 previously been marked as Exhibit 17. Will you</p> <p>6 please turn to Zurich 3701 within Exhibit 17.</p> <p>7 Are you with me, Ms. Wagner?</p> <p>8 A. I am.</p> <p>9 Q. Thank you.</p> <p>10 That's a letter dated January 12, 2017,</p> <p>11 to you signed by Cris Palmer; is that right?</p> <p>12 A. Yes.</p> <p>13 Q. And Mr. Palmer is recommending that</p> <p>14 Zurich engage a defense expert by the name of</p> <p>15 Charlie Henderson, correct?</p> <p>16 A. Correct.</p> <p>17 Q. And ultimately you agree with</p> <p>18 proceeding to engage Mr. Henderson, correct?</p> <p>19 A. I did.</p> <p>20 Q. Here is what's previously been marked</p> <p>21 as Exhibit 18. Will you just please confirm</p> <p>22 that you received the letter and draft report</p> <p>23 that was provided by attorney Palmer as part of</p> <p>24 Exhibit 18. I'm sorry, let me -- did you</p> <p style="text-align: right;">139</p>
<p>1 received it?</p> <p>2 A. I did.</p> <p>3 (Whereupon, Wagner Deposition</p> <p>4 Exhibit No. 101 was marked for</p> <p>5 identification.)</p> <p>6 BY MR. SUTTON:</p> <p>7 Q. Exhibit 101, if you turn to the oldest</p> <p>8 e-mail in the chain on Zurich 3818, it indicates</p> <p>9 that there is a letter -- or Kristi Wood is</p> <p>10 sending you an e-mail on December 16, 2016,</p> <p>11 attaching a letter; is that right?</p> <p>12 A. Yes.</p> <p>13 Q. We'll look back at Exhibit 99, that's</p> <p>14 the same date, December 16, 2016, correct?</p> <p>15 A. Yes.</p> <p>16 Q. So, the e-mail on Zurich 3818, would</p> <p>17 you agree that that's the transmission of the</p> <p>18 letter that is Exhibit 99?</p> <p>19 A. I believe so, yes.</p> <p>20 Q. So, then we look at Exhibit 101, is</p> <p>21 this your responsive e-mail on the first page,</p> <p>22 Zurich 3817?</p> <p>23 A. It looks like it, yes.</p> <p>24 Q. And did you prepare this after</p> <p style="text-align: right;">138</p>	<p>1 receive Exhibit 18?</p> <p>2 A. I did.</p> <p>3 Q. And did you review the draft report</p> <p>4 when it was provided to you?</p> <p>5 A. I did.</p> <p>6 Q. Did you have any concerns with --</p> <p>7 regarding the opinions being promulgated by</p> <p>8 Mr. Henderson in defense of this case?</p> <p>9 A. Not that I recall.</p> <p>10 Q. Did you ever request that attorney</p> <p>11 Palmer engage any other experts other than</p> <p>12 Mr. Henderson as part of the defense of the</p> <p>13 case?</p> <p>14 A. Not that I recall.</p> <p>15 Q. I'm going to hand you what's previously</p> <p>16 been marked as Exhibit 33.</p> <p>17 This is a letter dated December 7,</p> <p>18 2017, from Cris Palmer to you; is that right?</p> <p>19 A. Yes.</p> <p>20 Q. So, that's -- the mediation was in</p> <p>21 October of 2016, correct?</p> <p>22 A. I believe so, yes.</p> <p>23 Q. Looking at the second paragraph,</p> <p>24 attorney Palmer writes, we are going to need to</p> <p style="text-align: right;">140</p>



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<p>1 A. Just his lack of effort all the way 2 through up to that point.</p> <p>3 Q. You would agree with me that after 4 the -- well, do you agree with me that after the 5 Hinshaw firm took over the defense of the case, 6 they were primarily making all strategic 7 decisions on the defense?</p> <p>8 A. I requested that they take the lead.</p> <p>9 Q. And as part of that, you expected that 10 they were making the strategic decisions, 11 correct?</p> <p>12 A. I expected them to take the lead in 13 those decisions.</p> <p>14 Q. At any time do you recall Mr. Palmer 15 communicating to you that he thought he had made 16 a mistake in handling the defense of the case?</p> <p>17 A. He did not.</p> <p>18 Q. Have you told me everything that 19 contributed to your decision to replace 20 Mr. Palmer with the Hinshaw law firm in defense 21 of the underlying bad faith case?</p> <p>22 A. I mean, as I said, the list is long.</p> <p>23 Q. Well, what's in that list?</p> <p>24 A. Um, like I said, it's complete lack of</p> <p style="text-align: right;">145</p>	<p>1 before I arrived there.</p> <p>2 Q. Are you aware of any information 3 indicating that Mr. Palmer had that information 4 prior to the morning of the mediation?</p> <p>5 A. I don't know.</p> <p>6 (Whereupon, Wagner Deposition 7 Exhibit Nos. 102-103 were 8 marked for identification.)</p> <p>9 BY MR. SUTTON:</p> <p>10 Q. Exhibit 102, Ms. Wagner, is a letter to 11 you dated January 5, 2018, from attorney Palmer; 12 is that right?</p> <p>13 A. Yes.</p> <p>14 Q. And in the third paragraph, attorney 15 Palmer represents an updated memorandum 16 regarding discovery; is that right?</p> <p>17 A. That's correct.</p> <p>18 Q. And when you look at -- you can't see 19 it because of the printing on the first page of 20 Exhibit 102, but the second page, there's a 21 Bates stamp Zurich 3909; is that right?</p> <p>22 A. Yes.</p> <p>23 Q. And actually, it's not sequential, that 24 means I'm wrong. So, will you turn to</p> <p style="text-align: right;">147</p>
<p>1 effort. Huge delays of being unresponsive. Not 2 providing me with answers to questions that I 3 articulated. Dragging his feet when it came to 4 scheduling the mediation. Missing the 5 opportunity to settle the case for lower 6 amounts. Blind siding me at the mediation.</p> <p>7 Q. How did Mr. Palmer blind side you at 8 the mediation?</p> <p>9 A. When I arrived, there was already 10 conversations taking place between plaintiff's 11 counsel and the mediator and Cris Palmer.</p> <p>12 Q. Did Mr. Palmer share with you what 13 those -- those discussions were?</p> <p>14 A. He said that they had discussed the 15 fact that the demand had been increased.</p> <p>16 Q. Did he tell you when he learned that 17 information?</p> <p>18 A. That morning.</p> <p>19 Q. Is there anything else that forms the 20 basis for why you claim Mr. Palmer blindsided 21 you at the mediation?</p> <p>22 A. He never indicated that the demand was 23 anything other than the 325,000 beforehand and 24 that Mr. Abourezk was going to withdraw it</p> <p style="text-align: right;">146</p>	<p>1 Exhibit 103.</p> <p>2 A. Okay.</p> <p>3 Q. What's the date of the memo that is 4 referenced in Exhibit 103?</p> <p>5 A. January 4th, 2018.</p> <p>6 Q. And what is the date of the letter that 7 is Exhibit 102?</p> <p>8 A. January 5th, 2018.</p> <p>9 Q. Do you know was Exhibit 103 the 10 enclosure that was provided to you in 11 conjunction with Exhibit 103?</p> <p>12 A. I believe so.</p> <p>13 Q. Did you review that when you received 14 it?</p> <p>15 A. Yes.</p> <p>16 (Whereupon, Wagner Deposition 17 Exhibit No. 104 was marked for 18 identification.)</p> <p>19 BY MR. SUTTON:</p> <p>20 Q. Exhibit 104 is an e-mail chain, which 21 is Zurich 3947 through 3950; is that right?</p> <p>22 A. Yes.</p> <p>23 Q. And is this e-mail chain the initial 24 contact that you sent out to a Mike Marick,</p> <p style="text-align: right;">148</p>

